

2011

What's Wrong with U.S.?: Why the United States Should Have a Public Performance Right for Sound Recordings

William Henslee

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/jetlaw>



Part of the [Entertainment, Arts, and Sports Law Commons](#), and the [Intellectual Property Law Commons](#)

Recommended Citation

William Henslee, What's Wrong with U.S.?: Why the United States Should Have a Public Performance Right for Sound Recordings, 13 *Vanderbilt Journal of Entertainment and Technology Law* 739 (2020)
Available at: <https://scholarship.law.vanderbilt.edu/jetlaw/vol13/iss4/2>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Entertainment & Technology Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

What's Wrong with U.S.?: Why the United States Should Have a Public Performance Right for Sound Recordings

William Henslee*

ABSTRACT

This Article discusses the need for the United States to implement a public performance royalty for sound recordings. Under the current system, song writers are compensated for the use of their musical works, but performers on sound recordings do not receive any compensation. Radio and television stations currently pay the performing rights societies a royalty for playing the sound recordings, but they do not pay a performance royalty to the artists who perform the music and record companies that promote and release the sound recordings. Proposed legislation will add a performance royalty for artists and record companies to the current royalty scheme while not reducing the current royalty paid to the songwriters. The Article argues for congressional adoption of a performance royalty.

TABLE OF CONTENTS

I.	HISTORY.....	742
	A. <i>The Distinction Between Musical Works and Sound Recordings</i>	743
	B. <i>The Early Call for a Performance Right</i>	746
II.	CONTRASTING THE UNITED STATES PERFORMANCE ROYALTY SYSTEM WITH THE EUROPEAN UNION PUBLIC PERFORMANCE RIGHTS SYSTEM.....	750

* © 2011 William Henslee. Associate Professor of Law, and founding faculty member, Florida A & M University College of Law. B.A. University of Hawaii, J.D. Pepperdine University School of Law, M.F.A. University of California, Los Angeles Graduate School of Theater, Film, & Television. Special thanks to Elizabeth Kirk, J.D., for her insightful contributions to this Article. Thanks also to my program assistant, Sharon Jenrette.

III.	HISTORY OF THE PERFORMANCE RIGHTS SOCIETIES AND COLLECTIONS IN THE UNITED STATES.....	752
A.	<i>The Creation of Performance Rights Societies under the 1909 Act</i>	752
B.	<i>Limitations on the Public Performance Right under the 1976 Act</i>	755
1.	Non-Profit Performances	755
2.	Small Public Establishments (Restaurant Exception).....	756
3.	Record Stores	756
4.	State Fairs and Performances for the Handicapped ..	757
C.	<i>Performance Rights Societies Today and the Need for a Public Performance Right for Broadcast Radio</i>	757
IV.	WHY RECORDING ARTISTS NEED AND DESERVE A PUBLIC PERFORMANCE RIGHT IN SOUND RECORDINGS.....	758
V.	ANALYSIS OF PROPOSED SOLUTIONS	760
VI.	CONCLUSION.....	764

I started working with Kenia in 1985.¹ She had just finished her first album on an independent jazz label in New York and the first single was getting heavy airplay. Ricky Schultz,² then president of Zebra Records, was driving down the street in Berkeley, California when “Brincadeira”³ came on the radio. Ricky pulled over to the side of the road, called the radio station for information on the artist, and began tracking her down.⁴ He was looking for new artists because he was in the process of negotiating a distribution deal with Universal

1. Kenia Acioly is a jazz artist from Brazil, who has produced seven albums and been nominated for multiple Brazilian Press Awards. She is currently nominated for two Brazilian Press Awards. Kenia originally signed with Jazzmania Records, which released her first album. That album, “Initial Thrill,” was purchased by Zebra Records/Universal Jazz and was re-released in 1987. For more information, see Kenia’s website, KENIA, <http://officialkenia.com/> (last visited Feb. 28, 2011).

2. Ricky Schultz is a record executive with over thirty years’ experience. Schultz has held vice president positions at Warner Bros., MCA, and the Los Angeles Chapter of the Recording Academy, where he also served on the Grammy Jazz Screening Committee for twelve years. He is the founder and president of Zebra Records, and has produced or executive produced more than 100 albums plus live events and received two Billboard Video nominations. *Ricky Schultz Bio*, ZEBRA RECORDS, <http://www.zebrarecords.com/bio.htm> (last visited Feb. 28, 2011).

3. Words and music were written by Ricardo DeBarros Sjosted, professionally known as Ricardo Bomba. The song is registered with the copyright office. *Brincadeira*, U.S. COPYRIGHT OFFICE, <http://cocatalog.loc.gov/> (search “Brincadeira” by title; then follow the first listing hyperlink) (last visited Feb. 28, 2011). It appeared on Kenia’s album, “Initial Thrill,” produced by Peter Drake. *Id.*

4. Interview with Ricky Schultz, Former Owner of ZEBRA Records (Jan. 22, 2011).

Music.⁵ Kenia hired me to negotiate her release from the small, independent label and her new contract with Zebra/Universal Jazz.

During the negotiation, the issue arose of ownership of the original songs. The record company wanted to own the copyrights of Kenia's original songs and serve as her publishing company. Knowing that Kenia did not write her own songs, and at that time did not intend to start writing her own songs, I gave the record company the music publishing rights in exchange for two additional royalty points.⁶ I knew that if Kenia was successful, and she decided to start writing her own songs, we could renegotiate the deal and would already have a high base royalty rate from which to work. Don Tringali,⁷ who represented Zebra/Universal Jazz during the negotiation, said he was surprised that I gave up the publishing rights for more points because generally, the songwriter is the only person who makes money in a record deal.⁸ The songwriter collects mechanical royalties from record sales and performance royalties from airplay.⁹ The performer only receives royalties from record sales after the album recoups its budget, which is rare.¹⁰ I understood all of that, but since Kenia did not write

5. *Id.* ("Mr. Schultz owned and operated ZEBRA Records for 25 years. The label was distributed worldwide first by MCA/Universal and later, the WARNER Music Group. ZEBRA produced more than 60 CDs. Its radio driven chart success generated no performance royalties in the United States until the past few years when SOUNDEXCHANGE began collecting performance royalties from cable and internet services. Commercial radio broadcasters have managed to not share any of their enormous revenues with performers and record labels." © 2011 Ricky Schultz).

6. Typically an artist is paid a percentage of the income derived from album sales. This payment is called a royalty. The term "points" is synonymous with "percentage." See Eric Leach & William Henslee, *Follow the Money: Who's Really Making the Dough?*, ELECTRONIC MUSICIAN (Nov. 1, 2001, 12:00 PM), http://emusician.com/mag/emusic_follow_money_whos/index.html.

7. Donald J. Tringali was admitted to the California Bar in December, 1982. He received his undergraduate degree in Economics from the University of California, Los Angeles, and his law degree from Harvard University Law School. See *Donald J. Tringali Bio*, AUGUSTA ADVISORY GROUP, <http://augustaadvisorygroup.com/DJTBio.pdf> (last visited Feb. 28, 2011).

8. For an example see the Dolly Parton/Whitney Houston discussion in the conclusion below, *infra* notes 175–178 and accompanying text.

9. Interview with Ricky Schultz, *supra* note 4 ("The United States remains one of the few major markets in the world where *neither* the recording artist (performer) nor the recording's copyright owner (record company) receive performance royalties. Curiously, *only* the song's copyright owners (songwriters and music publishers) earn such royalties." © 2011 Ricky Schultz).

10. See Eric Leach & William Henslee, *Follow the Money: Who's Really Making the Dough?*, ELECTRONIC MUSICIAN (Nov. 1, 2001, 12:00 PM), http://emusician.com/mag/emusic_follow_money_whos/index.html. Leach and Henslee write:

Huge stars make lots of money, but most artists, even if moderately successful, generally struggle to make a buck. First of all, the artist won't see any royalty money until the record company recoups its advance production budget. To further complicate the math, the artist usually must pay 3 percent of the royalty to the record producer. Deduct the 3 percent from the royalty rate, and the record company recoups its \$500,000 advance at \$1.80 per unit sold. Therefore, the artist won't begin seeing money from sales until 277,778 units are sold, and only about 3 percent of records ever reach that sales figure.

her own songs, we decided to get a higher base royalty in exchange for the publishing so that the album would recoup its budget faster and Kenia could start receiving record royalties sooner. Needless to say, the record never recouped its budget and the songwriters made all of the money. Had there been a performance royalty for performers at that time, Kenia would have been able to devote herself to her music career full-time instead of having to work odd jobs to pay the bills.¹¹ Kenia is one of many examples of artists who have made money for her songwriters while not receiving any income for the airplay of her songs.

This Article will begin with a discussion of the historical reasons why the United States has never enacted a performance royalty for performing artists and conclude by advocating for the passage of a performance rights bill so that the United States will begin providing its performers the same rights that the rest of the world's developed nations provide for their performing artists.

I. HISTORY

To comprehend the reasons behind the inequity in the payment of performance rights between songwriters and performers, one must first understand the history and compromises that led to the current system. Prior to 1972,¹² there was no federal statutory copyright protection for sound recordings.¹³ The original reason for the lack of protection stemmed from the requirement that copyrightable material be visually perceptible.¹⁴ While considering the issue for the 1909 Act,¹⁵ Congress decided to maintain the current system and allow

Id.

11. Kenia recorded two albums for Zebra/Universal Jazz before being released by the label. In her next record contract with Dennon Records, we kept the publishing rights so that she could co-write the songs and participate in the performance rights money payable to songwriters and music publishers.

12. Prior to February 15, 1972, sound recordings were only protected by state common law. See 17 U.S.C. §§ 102(a)(7), 301(c) (2006).

13. Capital Records, Inc. v. Naxos of Am., Inc., 830 N.E.2d 250, 260 (N.Y. 2005).

14. White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 11 (1908). Justice Holmes wrote the concurring opinion, stating:

A musical composition is a rational collocation of sounds apart from concepts, reduced to a tangible expression from which the collocation can be reproduced either with or without continuous human intervention. On principle anything that mechanically reproduces that collocation of sounds ought to be held a copy, or, if the statute is too narrow, ought to be made so by a further act, except so far as some extraneous consideration of policy may oppose.

Id. at 19–20 (Holmes, J., concurring).

15. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (codified as amended at 17 U.S.C. §§ 1-216 (2006)).

copyright owners to rely on the broad and flexible power of the common law to protect their property rights in their sound recordings after public dissemination, which would allow the law to keep up with ever-changing technologies.¹⁶ Six decades ago, *Metropolitan Opera Association v. Wagner-Nichols Recorder Corp.* stated that the common law “has allowed the courts to keep pace with constantly changing technological and economic aspects so as to reach just and realistic results.”¹⁷ However, the rapid development of technology that facilitates music piracy has rendered the common law largely ineffective in protecting musical works. For pre-1972 sound recordings, courts and state legislatures have found common law remedies inadequate as deterrents to widespread piracy once a sound recording is disseminated, leaving artists and music publishers with plummeting record sales.¹⁸ Even the Copyright Act of 1976 and its amendments have struggled to keep up with changing technology.¹⁹ The Act has not yet been amended to pay performers a royalty for airplay, which would benefit both record companies and recording artists in a time when the market appears to be shifting from an album-based business to a single-song download business.²⁰

A. The Distinction Between Musical Works and Sound Recordings

All songs played on the radio, released on CDs, or digitally available have two distinct copyrights.²¹ The first copyright is for the musical work;²² the second copyright is for the sound recording.²³ The musical work is the underlying lyrics and melody that combine to form the musical composition.²⁴ The sound recording is the aural manifestation of recorded sounds by instruments and vocalists.²⁵

In 1908, the Supreme Court first recognized the distinction between musical works and sound recordings by discussing the

16. See *Capital Records*, 830 N.E.2d at 260.

17. *Metro. Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 101 N.Y.S.2d 483, 495 (N.Y. Sup. Ct. 1950).

18. See *Capital Records*, 830 N.E.2d at 260.

19. See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

20. As album sales decreased, individual digital song sales increased. There were 844.1 million downloaded tracks (a 45% rise from 2006), and 50 million digital albums sold (a 53.5% increase). Antony Bruno, *Downloads to the Rescue: Digital Commerce Hits Record High in '07*, BILLBOARD, Jan. 12, 2008, at 6.

21. *Recording Indus. Ass'n of Am., Inc. v. Librarian of Cong.*, 608 F.3d 861, 863 (D.C. Cir. 2010).

22. 17 U.S.C. § 102(a)(2) (2006).

23. *Id.* § 102(a)(7); *Recording Indus. Ass'n of Am., Inc.*, 608 F.3d at 863.

24. 17 U.S.C. § 101.

25. *Recording Indus. Ass'n of Am., Inc.*, 608 F.3d at 863.

relationship between perforated piano rolls that produced music when played in a mechanical piano and the sheet music that was the basis for the perforations.²⁶ While the Copyright Act unquestionably protected sheet music, the perforated piano rolls presented the Court with a conundrum.²⁷ By strictly construing the language of the statute, the court concluded that Congress did not intend the current Copyright Act to protect copies that the naked eye could not perceive.²⁸ The sound recording itself the mechanical reproduction on perforated rolls ostensibly only readable by a machine was not protected.²⁹

The 1909 Copyright Act granted a limited mechanical reproduction right to sound recordings in § 1(e), which had previously only protected musical works typically embodied in sheet music.³⁰ These mechanical reproduction royalties came in the form of a royalty for the use of music on records (a compulsory license), a notice of use of music on records, and the right to license use of music on records; however, sound recordings were still not protected.³¹ Sections 4 and 5

26. White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 16-17 (1908).

27. *Id.* Justice Day's opinion stated:

A musical composition is an intellectual creation which first exists in the mind of the composer; he may play it for the first time upon an instrument. *It is not susceptible of being copied until it has been put in a form which others can see and read.* The statute has not provided for the protection of the intellectual conception apart from the thing produced, however meritorious such conception may be, but has provided for the making and filing of a tangible thing, against the publication and duplication of which it is the purpose of the statute to protect the composer.

Id. at 17 (emphasis added).

28. *Id.* at 18.

29. *Id.*

30. Copyright Act of 1909, Pub. L. No. 60-349, § 1(e), 35 Stat. 1075, 1075 (1909).

31. *Id.* Section 1(e) of the Act states:

And provided further, and as a condition of extending the copyright control to such mechanical reproductions, That whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of two cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the twentieth day of each month on the number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the twentieth of the next succeeding month. The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit: *And provided further,* That it shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the Copyright Office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.

Id. at 1076.

specifically stated that “all writings of an author” were protected; but, the list of protected works did not include sound recordings.³² This created a void in protection that Congress rectified when the Sound Recording Act of 1971 incorporated sound recordings as protected works under the 1909 Copyright Act.³³ This amendment was designed to prevent phonorecord piracy—a major problem at the time—and therefore only protected the rights of reproduction, distribution, and adaptation.³⁴ The 1976 Copyright Act did not expand the 1971 Sound Recording Act’s protection of sound recordings, and specifically left the public performance right out of the protected rights.³⁵ The omission formalized the divide between sound recordings and other “writings” afforded protection in the Copyright Act.³⁶ Copyright exists in “works of authorship,” but musical works and sound recordings are separate categories of 17 U.S.C. § 102.³⁷ This minor distinction has created major differences in the way musical works and sound recordings are

32. *Id.* §§ 4–5, 35 Stat. at 1076–77.

SEC. 4. That the works for which copyright may be secured under this Act shall include all the writings of an author.

SEC. 5. That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs: (a) Books, including composite and cyclopædic works, directories, gazetteers, and other compilations; (b) Periodicals, including newspapers; (c) Lectures, sermons, addresses, prepared for oral delivery; (d) Dramatic or dramatico-musical compositions; (e) Musical compositions; (f) Maps; (g) Works of art; models or designs for works of art; (h) Reproductions of a work of art; (i) Drawings or plastic works of a scientific or technical character; (j) Photographs; (k) Prints and pictorial illustrations.

Id.

33. Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971). The Act originally applied only to sound recordings copyrighted before January 1, 1975, but the changes were later made permanent. *Id.* § 3, 85 Stat. at 392; Act of Dec. 31, 1974, Pub. L. No. 93-573, § 101, 88 Stat. 1873, 1873 (1974).

34. Sound Recording Act § 1; see H.R. REP. NO. 92-487 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1567, 1567–70.

35. Copyright Act of 1976, Pub. L. No. 94-553, § 106, 90 Stat. 2541, 2546 (codified as amended at 17 U.S.C. § 106 (2006)).

36. *Id.* § 114(a), 90 Stat. at 2560 (“The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), and (3) of section 106, and do not include any right of performance under section 106(4).”).

37. 17 U.S.C. § 102(a).

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; (2) *musical works, including any accompanying words*; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) *sound recordings*; and (8) architectural works.

Id. (emphasis added).

treated by Congress,³⁸ the courts, and record and music publishing companies.³⁹

B. The Early Call for a Performance Right

The 1971 Sound Recording Act recognized sound recordings as “writings” deserving Copyright Protection.⁴⁰ However, this recognition did not grant sound recording copyright owners the “full array” of exclusive rights that other authors enjoyed, including the public performance right.⁴¹ The protection afforded under the 1971 Sound Recording Act was designed to prevent phonorecord piracy; and accordingly, Congress constructed the Act to create uniform federal protection against unauthorized duplication of sound recordings and to ease the United States’ entry into the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms.⁴² The Recording Industry Association of America (RIAA) lobbied for increased rights, while the National Association of Broadcasters (NAB) opposed performance rights.⁴³ Other concerned parties (performers, manufacturers, and publishers) also joined the debate over the economic impact of a performance right.⁴⁴ As the debate continued and Congress passed the 1976 Copyright Act, the House Report stated:

38. Eric D. Leach, *Everything You Always Wanted to Know About Digital Performance Rights but Were Afraid to Ask*, in 1 DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS ACT OF 1995: A LEGISLATIVE HISTORY OF PUBLIC LAW NO. 104-39, 109 STAT. 336 191, 203–11 (William H. Manz, ed., 2002); Jay L. Bergman, *Digital Technology has the Music Industry Singing the Blues: Creating a Performance Right for the Digital Transmissions of Sound Recordings*, 24 SW. U. L. REV. 351, 354–58 (1995).

39. Recording Indus. Ass’n of Am., Inc. v. Librarian of Cong., 608 F.3d 861, 863 (D.C. Cir. 2010) (“Most songs played on the radio, sold on CDs in music stores, or digitally available on the Internet through services like iTunes embody two distinct copyrights—a copyright in the ‘musical work’ and a copyright in the ‘sound recording.’ The musical work is the musical composition—the notes and lyrics of a song as they appear on sheet music. The sound recording is the recorded musical work performed by a specific artist. Although almost always intermingled in a single song, those two copyrights are legally distinct and may be owned and licensed separately.”); *see also* Capital Records, Inc. v. Naxos of Am., Inc., 830 N.E.2d 250, 260 (N.Y. 2005) (indicating that there is a historical distinction between musical works and sound recordings); Brief for Appellee at 8–9, Soundexchange, Inc. v. Librarian of Cong., No. 08-1078, 2009 WL 356336 (D.C. Cir. Feb. 12, 2009) (“[M]usical works’ and ‘sound recordings’ are distinct works under the Copyright Act, and may be owned and licensed separately.”).

40. Sound Recording Act of 1971, Pub. L. No. 92-140, § 1, 85 Stat. 391, 391–92 (1971); *The Performance Rights in Sound Recordings Act of 1995: Before the S. Comm. on the Judiciary*, 104th Cong. 41 (1995) [hereinafter *Performance Rights Hearing*] (statement of Marybeth Peters, Register of Copyrights and Assoc. Librarian for Copyright Servs., Library of Cong.).

41. *Performance Rights Hearing*, *supra* note 40, at 41 (statement of Marybeth Peters).

42. *Id.* at 41–42.

43. *Id.* at 42.

44. *Id.*

The Committee considered at length the arguments in favor of establishing a limited performance right, in the form of a compulsory license, for copyrighted sound recordings, but concluded that the problem requires further study. It therefore added a new subsection (d) to the bill requiring the Register of Copyright to submit to Congress, on January 3, 1978, a report setting forth recommendations as to whether this section should be amended to provide for performers and copyright owners . . . any performance rights in copyrighted sound recording.⁴⁵

The Copyright Office prepared its study report after conducting extensive research and receiving input from interested parties.⁴⁶ The study stated that public performance royalties were consistent with, and should be included in, the current copyright scheme covering music licensing.⁴⁷

At the conclusion of the analysis, the Copyright Office "adhered to the philosophy it traditionally followed to interpret its constitutional mandate; that is, that copyright legislation must ensure the necessary balance between giving authors necessary monetary incentive without limiting access to an author's works."⁴⁸ While the implementation legislation was introduced in Congress after the publication of the report, the legislation was not enacted.⁴⁹

In 1991, the Copyright Office again put its full weight behind the movement to create a public performance right in sound recordings. The Register's *1991 Report on Copyright Implications of Digital Audio Transmission Services* included strong policy reasons to

45. H.R. REP. NO. 94-1476, at 106 (1976).

46. SUBCOMM. ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE, H. COMM. ON THE JUDICIARY, 95TH CONG., PERFORMANCE RIGHTS IN SOUND RECORDINGS 1 (Comm. Print 1978) (report prepared by Register of Copyrights) [hereinafter 1978 PERFORMANCE RIGHTS REPORT]. The introduction to the Report states:

Our investigation has involved legal and historical research, economic analysis, and also the amassing of a great deal of information through written comments, testimony at hearings, and face-to-face interviews. We identified, collected, studied, and analyzed material dealing with a variety of constitutional, legislative, judicial, and administrative issues, the views of a wide range of interested parties, the sharply contested arguments concerning economic issues, the legal and practical systems adopted in foreign countries, and international considerations, including the International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations (adopted at Rome in 1961).

Id.

47. *Id.* at 24-26, 174-77.

Sound recordings fully warrant a right of public performance. Such rights are entirely consonant with the basic principles of copyright law generally, and with those of the 1976 Copyright Act specifically. Recognition of these rights would eliminate a major gap in the recently enacted general revision legislation by bringing sound recordings into parity with other categories of copyrightable subject matter. A performance right would not only have a salutary effect on the symmetry of the law, but also would assure performing artists of at least some share of the return realized from the commercial exploitation of their recorded performances.

Id. at 177.

48. *Performance Rights Hearings*, *supra* note 38, at 42 (statement of Marybeth Peters).

49. *Id.* at 43.

reconcile the treatment between sound recordings and other works of authorship.⁵⁰ The Copyright Office pointed out, once again, the disparity in treatment between sound recordings and other works by noting the lack of a public performance right.⁵¹

With the Performance Rights Act of 1995, the Copyright Office again lobbied Congress to institute a public performance right for sound recordings.⁵² In her statement, Marybeth Peters, Register of Copyrights, urged:

Undoubtedly, U.S. performers would benefit if Congress granted a public performance rights [sic] in their sound recordings enabling these authors to claim their fair share of foreign royalties. Moreover, justice requires that performers and producers of sound recordings be accorded a public performance right. As a world leader in the creation of sound recordings, the United States, should no longer delay in giving its creators of sound recordings the minimum rights many countries give their performers and producers. Unlike many of those countries, the United States already protects sound recordings under copyright law, but it is time to take the next step and recognize a performance right in sound recordings. Finally, protection should be granted swiftly before technology erodes even further the rights that performers and producers of sound recordings should enjoy.⁵³

With this legislation, Congress and the Copyright Office reached a compromise that recognized that emerging digital transmission technology created a need for a compulsory license to cover the distribution of a phonorecord in a digital format, thereby granting a limited public performance right to the digital transmission of sound recordings.⁵⁴ The 1995 Sound Recording Act also introduced a

50. U.S. COPYRIGHT OFFICE, COPYRIGHT IMPLICATIONS OF DIGITAL AUDIO TRANSMISSION SERVICES 160 (1991).

51. *Id.*

The Office concludes that sound recordings are valid works of authorship and should be accorded the same level of copyright protection as other creative works. In fact, as advanced technology permits more copying and performing of American music, the Office is convinced that a performance right . . . [i]s even more essential to compensate American artists and performers fairly.

Id.

52. *Performance Rights Hearing*, *supra* note 38, (statement of Marybeth Peters).

53. *Performance Rights Hearings*, *supra* note 38, at 43 (statement of Marybeth Peters, Register of Copyrights and Assoc. Librarian for Copyright Servs., Library of Cong.).

54. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified in scattered sections of 17 U.S.C.). The Senate Report recommending this legislation stated:

[I]n the absence of appropriate copyright protection in the digital environment, the creation of new sound recordings and musical works could be discouraged, ultimately denying the public some of the potential benefits of new digital transmission technologies. The Committee believes that current copyright law is inadequate to address all of the issues raised by these new technologies dealing with the digital transmission of sound recordings and musical works and, thus, to protect the livelihoods of the recording artists, songwriters, record companies, music publishers and others who depend upon revenues derived from traditional record sales.

definition of a “digital phonorecord delivery” in 17 U.S.C. § 115: “A ‘digital phonorecord delivery’ is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording . . . or any nondramatic musical work embodied therein.”⁵⁵ This definition acknowledges rights of public performance and reproduction or transmission.⁵⁶ Since the 1995 Sound Recording Act, both the 110th⁵⁷ and 111th⁵⁸ Congresses have introduced the Performance Rights Act, which would grant a royalty for all performances of sound recordings. Both attempts failed to make it to the House and Senate floors for a vote after passing in Committee.⁵⁹ Broadcast radio, satellite radio, Internet radio, and cable radio all pay performance royalties for musical works, while all but broadcast radio pay performance royalties for sound recordings.⁶⁰

In particular, the Committee believes that recording artists and record companies cannot be effectively protected unless copyright law recognizes at least a limited performance right in sound recordings.

S. REP. NO. 104–128, at 14 (1995).

55. 17 U.S.C. § 115(d) (2006) (“A digital phonorecord delivery does not result from a real-time, non-interactive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible.”).

56. William Henslee, *Marybeth Peters Is Almost Right: An Alternative to Her Proposals to Reform the Compulsory License Scheme for Music*, 48 WASHBURN L.J. 107, 115 (2008). Marybeth Peters writes:

Congress made changes to Section 115 to meet the challenges of providing music in a digital format when it enacted the Digital Performance Right in Sound Recordings Act of 1995 (“DPRA”) . . . which also granted copyright owners of sound recordings an exclusive right to perform their works publicly by means of a digital audio transmission . . . subject to certain limitations. . . . The amendments to Section 115 clarified the reproduction and distribution rights of music copyright owners and producers and distributors of sound recordings, especially with respect to what the amended Section 115 termed “digital phonorecord deliveries.” Specifically, Congress wanted to reaffirm the mechanical rights of songwriters and music publishers in the new world of digital technology.

Section 115 of the Copyright Act: In Need of an Update?: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary, 108th Cong. 21 (2004) (statement of Marybeth Peters).

57. H.R. 4789, 110th Cong. (2007); S. 2500, 110th Cong. (2007).

58. H.R. 848, 111th Cong. (2009); S. 379, 111th Cong. (2009).

59. Louis Hau, *Static Over The Air: Prospects Dim for Radio Performance Royalty Settlement*, BILLBOARD, Nov. 6, 2010 (“Last fall, the U.S. House and Senate judiciary committees passed the Performance Rights Act, which would require U.S. terrestrial radio stations to pay performance royalties for the first time.”).

60. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-826, TELECOMMUNICATIONS: THE PROPOSED PERFORMANCE RIGHTS ACT WOULD RESULT IN ADDITIONAL COSTS FOR BROADCAST RADIO STATIONS AND ADDITIONAL REVENUE FOR RECORD COMPANIES, MUSICIANS, AND PERFORMERS 6 (2010). The following table illustrates this distinction:

II. CONTRASTING THE UNITED STATES PERFORMANCE ROYALTY SYSTEM WITH THE EUROPEAN UNION PUBLIC PERFORMANCE RIGHTS SYSTEM

Virtually all industrialized countries, except the United States, recognize a public performance right for broadcast radio.⁶¹ Many of these countries belong to international treaties that provide protection for performers and producers of sound recordings with a public performance right.⁶²

The Rome Convention of 1961 was the first international treaty to provide a performance right for sound recordings.⁶³ Abraham Kamenstein, the U.S. Register of Copyrights at the time, served as rapporteur-general of the Diplomatic Conference, but did not personally sign the treaty on behalf of the United States.⁶⁴ Article 12 of the Rome Convention provides protection for secondary uses of

Type of radio transmission	Type of Copyright License Needed and Royalty Paid	
	Musical Work	Sound Recording
Broadcast radio	X	
Satellite radio	X	X
Internet radio, including simulcasts of broadcast radio	X	X
Cable radio	X	X

Id.

61. Countries That Pay A Public Performance Right For Broadcast Radio:

Austria	France	Japan	Portugal
Australia	Germany	Luxembourg	Slovakia
Belgium	Greece	Mexico	South Korea
Canada	Hungary	Netherlands	Spain
Czech Republic	Iceland	New Zealand	Sweden
Denmark	Ireland	Norway	Switzerland
Finland	Italy	Poland	Turkey
			United Kingdom

62. See, e.g., World Intellectual Property Organization: Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 76 [hereinafter WPPT]. Eighty seven countries have accepted the terms for performers' rights in unfixed performances, rights of reproduction and distribution for performers and producers, and general performance right in sound recording. *Contracting Parties*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=20 (last visited Feb. 28, 2011).

63. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention].

64. *Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century: Hearing Before the Subcomm. on Courts, the Internet and Intellectual Prop. of the H. Comm. on the Judiciary*, 110th Cong. 27-28 (2007) [hereinafter *Fair Compensation Hearing*] (statement of Marybeth Peters).

phonograms—defined as use of phonograms in broadcasting and communications to the public, which included the public performance right.⁶⁵

Although the United States did not sign the Rome Convention,⁶⁶ the United States has signed international treaties that include a public performance right. In 1994, the United States signed the Trade Related Aspects of Intellectual Property Rights (TRIPS), which permitted enforcement of the Berne Convention and Rome Convention.⁶⁷ Article 14, entitled “Protection of Performers, Producers of Phonograms (Sound Recordings) and Broadcasting Organizations,” allows authors to prevent transmissions and reproductions of their live performances.⁶⁸ This, in turn, provided protection for foreign authors within the United States by implementing the TRIPS agreement and granting a potential limited public performance right.⁶⁹ However, since the U.S. Copyright Act of 1976 does not grant this public performance right, enforcement has been limited to digital satellite, Internet, and cable transmissions.⁷⁰

In 1996, the public performance right again became a hot button issue with the signing of the World Intellectual Property Organization (WIPO) Performances and Phonogram Treaty (WPPT).⁷¹ The WPPT, effective May 20, 2002, recognizes: (1) performers’ rights in unfixed performances;⁷² (2) performers’ rights of reproduction and distribution for performers and producers;⁷³ and (3) a general performance right in sound recordings.⁷⁴ Article 15 allows WIPO members to provide for the right to equitable remuneration to performers and producers for the broadcasting and communication to the public of their phonograms.⁷⁵ However, the article also allows a country to limit this right, apply this right only to certain uses, or

65. Rome Convention, *supra* note 62, at art. 12.

66. *Fair Compensation Hearing*, *supra* note 63, at 27 (statement of Marybeth Peters) (“The U.S. never adhered to the Rome Convention.”).

67. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Instruments—Results of the Uruguay Round vol. 1, 1869 U.N.T.S. 299, 33 I.L.M. 1125, 1197 (1994) [hereinafter TRIPS Agreement].

68. *Id.* at art. 14(1), 33 I.L.M. at 1202.

69. *See id.*

70. *See Fair Compensation Hearing*, *supra* note 63, at 17, 21 (statement of Marybeth Peters).

71. *See* WPPT, *supra* note 61.

72. *Id.* at art. 6, 36 I.L.M. at 82.

73. *Id.* at art. 7–9, 11–13, 36 I.L.M. at 82–84.

74. *Id.* at art. 15(1), 36 I.L.M. at 85.

75. *Id.*

deny the right altogether.⁷⁶ Because the U.S. Copyright Act only allows for a limited public performance right in digital transmissions, the United States specifically stated that it would limit the right to only digital transmissions of a sound recording.⁷⁷ With this, the United States clarified that there would not be a public performance right for over-the-air broadcasts, distinguishing its public performance rights from other signatories.⁷⁸

Because of this lack of a full performance right, the United States—"the leader in creation, distribution, and world-wide licensing of recorded music"⁷⁹—stands as one of the few industrialized countries to deny the right for over-the-air broadcasts.⁸⁰ In addition, when American sound recordings are broadcasted abroad, there is usually no payment for the performances despite the fact that the royalties have been collected in the countries that signed the Rome Convention.⁸¹ In countries that signed the WPPT, American performers and producers do not receive payment for their public performance royalties because the right is not reciprocated.⁸²

III. HISTORY OF THE PERFORMANCE RIGHTS SOCIETIES AND COLLECTIONS IN THE UNITED STATES

A. The Creation of Performance Right Societies under the 1909 Act

Nearly half of the total music publishing revenue collected by U.S. music publishing companies comes from the public performances of sound recordings.⁸³ Performing rights societies collect and distribute these royalties.⁸⁴ These societies date back to 1913, when the American Society of Composers, Authors and Publishers (ASCAP) was conceived.⁸⁵ At the time, despite the popularity of songs and frequency of play, authors and publishers could not collect any form of royalty payments,⁸⁶ as the 1909 Copyright Act was unclear regarding

76. *Id.* art. 15(3), 36 I.L.M. at 85.

77. *Fair Compensation Hearing*, *supra* note 63, at 28 (statement of Marybeth Peters).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 29.

82. *Id.*

83. AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 1247 (4th ed. 2010).

84. *See id.* at 1248–49.

85. *Id.* at 1248 (describing how ASCAP was established following a dinner meeting in New York City with songwriter Victor Herbert, songwriter Irving Berlin, "the march king" John Philip Sousa, writer and publisher Jay Witmark, attorney Nathan Burkan, and Broadway show writer and future president of ASCAP Gene Buck).

86. *Id.*

whether or not it permitted songwriters to collect for public performances.⁸⁷ In fact, the 1909 Act stated that a license from the copyright owner was required by one wishing to perform the song only if the performance was rendered “publicly for profit.”⁸⁸ The actual collection of royalties presented a practical problem for individual copyright owners.⁸⁹ It was impractical for every songwriter to attempt to police every restaurant, dance hall, and bar to collect his individual royalties for his songs.⁹⁰

To alleviate the difficulties songwriters had in collecting their royalties, ASCAP was established in 1914.⁹¹ ASCAP became a nationwide policing organization that offered licenses to public establishments to perform ASCAP members’ songs.⁹² ASCAP filed its first lawsuit in 1917 against Shanley’s Restaurant for an unauthorized public performance of an ASCAP musical composition.⁹³ The restaurant’s argument was simple: because it did not charge admission, the song was not performed “for profit” as indicated by the 1909 Copyright Act, and thus there could be no royalty.⁹⁴ Justice Oliver Wendell Holmes recognized that live music was part of the overall ambiance of the restaurant, setting it apart from its competition.⁹⁵ He reasoned that any business employing live music as a part of its public appeal should pay for the privilege to indirectly profit from the intellectual property of another.⁹⁶ After the Court’s interpretation of the 1909 Act, ASCAP began “issuing music

87. *Id.*

88. *Id.* (citing 17 U.S.C. § 1(d) (1909)).

89. *Id.*

90. *Id.*

91. *Id.* at 1249.

92. *Id.*

93. *Id.* (citing *Herbert v. Shanley Co.*, 242 U.S. 591 (1917)).

94. *Id.* (citing *Herbert*, 242 U.S. at 591).

95. *Herbert*, 242 U.S. at 594–95 (“If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants’ performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation, or disliking the rival noise, give a luxurious pleasure not to be had from eating a silent meal. *If music did not pay, it would be given up. If it pays, it pays out of the public’s pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough.*” (emphasis added)).

96. *Id.*

performance licenses to hotels, concert halls, cabarets, and other places where music was performed for profit."⁹⁷

By 1926, coast-to-coast radio broadcasting brought a more profitable opportunity to music licensing schemes.⁹⁸ At first, broadcasters resisted paying for performances, but after several court battles, publishers established their right to collect performance licenses for public broadcast radio,⁹⁹ and ASCAP began negotiating licenses for a percentage of the stations' advertising revenue.¹⁰⁰ However, the broadcasters were concerned with ASCAP's monopoly and increasing costs.¹⁰¹ From 1931 to 1939 ASCAP increased its revenue from \$960,000 to \$4.3 million.¹⁰² In 1940, with a breakdown in negotiations looming, a group of broadcasters established Broadcast Music Incorporated (BMI).¹⁰³

BMI, which consisted of major radio networks and nearly 500 independent radio stations, opened offices in New York City on February 15, 1940.¹⁰⁴ As the five-year agreement previously reached by ASCAP and radio stations approached its expiration date, ASCAP threatened to double its rates.¹⁰⁵ Expecting the negotiations to fail, BMI had begun acquiring a catalog of popular songs for licensing to compete directly with ASCAP.¹⁰⁶ After months of getting no airplay for its songwriters, ASCAP settled with the networks.¹⁰⁷ Since that time, ASCAP and BMI have remained strong competitors.¹⁰⁸

While ASCAP was the only licensor of performing rights in the United States from 1914 to 1931, a European music publisher established the Society of European State Authors and Composers (SESAC) in 1931.¹⁰⁹ When SESAC began operating in the United States, it primarily recruited gospel and country music publishers; in 1973, SESAC began to affiliate writers directly and has expanded its presence in pop, rock, rhythm and blues, jazz, Latin, and classical music.¹¹⁰ ASCAP, BMI, and SESAC are the performing rights societies currently active in the United States.

97. KOHN & KOHN, *supra* note 82, at 1249.

98. *Id.*

99. *Id.* at 1250.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 1251.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 1251-52.

B. Limitations on the Public Performance Right under the 1976 Act

Congress passed the revamped Copyright Act in 1976.¹¹¹ The new Act eliminated the requirement that performances be “for profit” and granted owners the exclusive right to license public performances regardless of profit.¹¹² “To ‘perform’ a work means to recite, render, play, dance, or act it, either directly or by means of any device or process . . .”.¹¹³ Under the new specifications, a work is performed when a singer sings a song; a broadcaster transmits the singer’s performance; a cable television station retransmits the broadcast to subscribers; or *any* individual is playing the sound recording embodying the performance, or communicates the performance by turning on the radio.¹¹⁴ However, in eliminating the “for profit” requirement, Congress created a series of exemptions and limitations on the author’s exclusive right of public performance.¹¹⁵

1. Non-Profit Performances

Non-profit performances include four exemptions from the exclusive right of public performance.¹¹⁶ The first exemption is for face-to-face teaching activities of non-profit educational establishments.¹¹⁷ The second exempts forms of government and non-profit educational broadcasts of music where “systematic mediated instructionals” are necessary to encourage learning activities.¹¹⁸ The third exemption is for musical performances that occur during the course of religious services.¹¹⁹ The fourth exception applies to performances that lack a commercial advantage, requiring that the qualifying performance is “without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers . . .”.¹²⁰

111. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976). Note that under Section 111 of the Act a local broadcaster can retransmit the performance without infringing. § 111(a)(1), 90 Stat. at 2550–51 (codified at 17 U.S.C. § 111(a)(1) (2006)).

112. § 106(4), 90 Stat. at 2546; *see* KOHN & KOHN, *supra* note 82, at 1252.

113. § 101, 90 Stat. at 2543 (codified at 17 U.S.C. § 101 (2006)).

114. H.R. REP. NO. 94-1476, at 63; *see also* KOHN & KOHN, *supra* note 82, at 1253.

115. § 110, 90 Stat. at 2549–50.

116. *Id.*

117. § 110(1), 90 Stat. at 2549; *see also* KOHN & KOHN, *supra* note 82, at 1254.

118. § 110(2), 90 Stat. at 2549; *see also* KOHN & KOHN, *supra* note 82, at 1254.

119. § 110(3), 90 Stat. at 2549. Note, however, that religious broadcasts are not covered under this exemption. *Id.* (exempting performances “in the course of services *at a place of worship* or other religious assembly” (emphasis added)).

120. § 110(4), 90 Stat. at 2549–50.

2. Small Public Establishments (Restaurant Exception)

This exemption applies to small commercial establishments where the performances are made "by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes."¹²¹ This clause exempts businesses that perform music only from radio, television, or satellite, and do not re-transmit the performances beyond their establishment, nor charge admission.¹²² Congress amended the Act in 1998 to specify the requirements to qualify for the exemption: The establishment must be smaller than 2,000 square feet; and for restaurants or other food and drink establishments, the space must be smaller than 3,750 gross square feet.¹²³ However, the businesses that exceed the square footage requirement may qualify if they use six or fewer speakers, with no more than four speakers in any room, nor more than four televisions in total.¹²⁴

3. Record Stores

If the sole purpose of the performance of a sound recording is to promote the records offered for sale in the establishment, the Copyright Act recognizes the public performance in record stores as an exemption.¹²⁵ This exemption only applies if the performance is not transmitted beyond the store's location and immediate area of the sale.¹²⁶ Additionally, if the performance occurs in a large department store, the exemption does not apply to performances transmitted to other parts of the store.¹²⁷

121. § 110(5), 90 Stat. at 2550. In 1974, Congress explained the rationale for the exemption as, "The § 110(5) exemption will allow the use of ordinary radios and television sets for the incidental entertainment of patrons in small businesses or other professional establishments, such as taverns, lunch counters, hairdressers, dry cleaners, doctors' offices, etc." S. REP. NO. 983, 93d Cong., 2d Sess. 130 (1974).

122. 17 U.S.C. § 110(5) (2006).

123. § 110(5)(B).

124. 17 U.S.C. § 110(5)(B)(ii). For a more detailed discussion on the specifications for the restaurant exception, read 17 U.S.C. § 110 in its entirety. *See also* Broadcast Music, Inc. v. Claire's Boutiques, Inc., 949 F.2d 1482 (7th Cir. 1991).

125. § 110(7), 90 Stat. at 2550 (recognizing an exemption when the "performance of a nondramatic musical work by a vending establishment [is] open to the public at large without any direct or indirect admission charge, where the sole purpose of the performance is to promote the retail sale of copies or phonorecords of the work . . .").

126. KOHN & KOHN, *supra* note 82, at 1255.

127. *Id.*

4. State Fairs and Performances for the Handicapped

Performances by governmental bodies, non-profit horticultural/agricultural organizations at state fairs, or annual horticultural/agricultural exhibits are also exempt from the exclusive right of public performance.¹²⁸ In addition, programs designed for the blind, deaf, or otherwise handicapped are exempt as long as “the performance is made without any purpose of direct or indirect commercial advantage” and stems from broadcasts by the government, non-profit organizations, public broadcasting entities, and cable and television systems.¹²⁹

C. Performance Rights Societies Today and the Need for a Public Performance Right for Broadcast Radio

Over 400,000 writers and publishers currently own and run ASCAP.¹³⁰ BMI is owned by over 500 radio and television stations.¹³¹ 475,000 writers and publishers are affiliated with BMI and receive their royalties and dividends through BMI.¹³² SESAC is a private company which represents over 900 writers and 750 publishers.¹³³

These performance rights societies license and sublicense the public performances of musical works.¹³⁴ They grant licenses strictly on a non-exclusive basis.¹³⁵ When the musical works are licensed, the societies distribute 100% of the publisher’s share of the performance royalty to the copyright owner (usually a music publishing company) and 100% of the songwriter’s share to the songwriter, regardless of whether or not the writer owns the copyrights in the musical work.¹³⁶ Both the publisher and the songwriter receive their respective percentages directly from the performing rights society with which they affiliate.¹³⁷ A songwriter and his or her publishing company

128. § 110(6), 90 Stat. at 2550; *see also* KOHN & KOHN, *supra* note 82, at 1256.

129. § 110(8), 90 Stat. at 2550; *see also* KOHN & KOHN, *supra* note 82, at 1256.

130. *About ASCAP*, ASCAP, <http://www.ascap.com/about/> (last visited Feb. 28, 2011); *see also* KOHN & KOHN, *supra* note 82, at 1256–57.

131. KOHN & KOHN, *supra* note 82, at 1257. These include the same stations that created Broadcast Music Incorporated in 1940 in response to ASCAP’s rising royalty fees.

132. *About BMI*, BMI.COM, <http://www.bmi.com/about/> (last visited Feb. 28, 2011); *see also* KOHN & KOHN, *supra* note 82, at 1257.

133. *See* KOHN & KOHN, *supra* note 82, at 1257; *About SESAC*, SESAC, <http://www.sesac.com/About> (last visited Feb. 28, 2011).

134. KOHN & KOHN, *supra* note 82, at 1261.

135. *Id.*

136. *Id.*

137. *Id.* at 1262.

must belong to the same performing rights society and a songwriter can only belong to one of the societies.¹³⁸

Currently, unless the performer is the songwriter, the performing rights societies do not collect any royalties payable to the song's performer.¹³⁹ The societies pay only the author of the musical work and the owner of the publishing rights.¹⁴⁰ Non-writer performers do not receive a public performance royalty from broadcast radio.¹⁴¹ As a result, while the popularity of the singer or band drives the radio play of a song, the act of broadcasting does not provide a direct financial benefit to the performer.¹⁴² For example, when the song "Respect" plays on the radio, Aretha Franklin does not receive any compensation; Otis Redding's estate is the beneficiary of the current performance royalty scheme, because he wrote the song.¹⁴³ In the words of Marybeth Peters,

What is needed is a change to ensure that performers and record companies can continue to make a viable living from their craft . . . [A]n expansion of the performance right for sound recordings would . . . provide fair compensation to the creators and serve a significant stimulus to ensure that creators continue to develop new works throughout the 21st Century.¹⁴⁴

Congress should require broadcasters to pay artist performance royalties since the National Association of Broadcasters have been unable or unwilling to reach a deal with the RIAA.¹⁴⁵

IV. WHY RECORDING ARTISTS NEED AND DESERVE A PUBLIC PERFORMANCE RIGHT IN SOUND RECORDINGS

As a result of the disparity of performing rights, the way royalties are distributed lacks symmetry. To give artists a performance right interest would allow performers to receive some of the income generated from the commercial exploitation of their recorded performances. In a four-person band where one person writes the songs and does not share songwriting revenue with the other three, and the band splits the recording, touring, and merchandising revenue equally, the songwriter could fly first class while the rest of the team flies coach, based on the disparity of

138. *Id.*

139. *Fair Compensation Hearing*, *supra* note 63, at 95–97 (statement of Sam Moore, Recording Artist)

140. *Id.* at 26 (statement of Marybeth Peters).

141. *Id.* at 26–27 (statement of Marybeth Peters).

142. *Id.* at 95–97 (statement of Sam Moore, Recording Artist).

143. Ann Chaitovitz, *The Need for Public Performance Right*, FUTURE OF MUSIC COAL. (Jan. 7, 2009), <http://futureofmusic.org/article/article/need-public-performance-right>.

144. *Fair Compensation Hearing*, *supra* note 63, at 30 (statement of Marybeth Peters).

145. *Hau*, *supra* note 58.

income.¹⁴⁶ While an artist performance royalty will not close the gap between them, the royalty will supplement the income of all of the members of the band.¹⁴⁷ Broadcasters have complained that the royalties ASCAP forced them to pay are too high.¹⁴⁸ BMI was created in response to such complaints.¹⁴⁹ Now that royalties for musical works are a cost of doing business, it is time to reward the performers who make the musical works popular.

Radio is a \$20 billion industry.¹⁵⁰ Terrestrial radio broadcasters pay more than \$450 million annually in royalties to ASCAP, BMI, and SESAC.¹⁵¹ Non-writer performers have been creating radio hits for decades without receiving any compensation.¹⁵² Yet, the National Association of Broadcasters has always indicated that a public performance royalty in sound recordings would be a death tax, forcing many broadcast networks to go out of business.¹⁵³

146. Leach & Henslee, *supra* note 10.

147. *Id.*

148. KOHN & KOHN, *supra* note 82, at 1257.

149. *Id.*

150. *Fair Compensation Hearing*, *supra* note 63, at 95 (statement of Sam Moore, Recording Artist).

151. *Id.* at 42 (statement of Charles M. Warfield, Jr., President and Chief Operating Officer, ICBC Broadcast Holdings, Inc., New York, NY).

152. *Id.* at 96 (statement of Sam Moore, Recording Artist). Sam Moore stated,

I remember Mary Wells coming to my house after she was diagnosed with cancer. Mary brought so many great songs to life, including the number one hit 'My Guy.' And yet, she told my wife and me that she didn't know what would happen to her little girl Sugar after she died. In 1992, with no income earned from decades of radio airplay, Mary died without being able to provide for her daughter. Sugar spent several of her younger years sleeping on a pallet in the kitchen of her older sister's one bedroom apartment shared with the sister's husband and young children. And there are so many others. I think about the late Junior Walker . . . going out on tour sick with cancer, needing to earn income. Bo Diddley today is still recovering from a stroke he suffered last year while performing—at nearly 80 years old. As frail as he was, he needed to work. Many of our greatest artists, who created the recordings that are the soundtracks of our lives, must tour until they die because they are not fully or fairly compensated for the performances of their work. They're not compensated at all for their radio airing in our great country.

Id.

153. See *Copyright Issues: Cable Television and Performance Rights: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 96th Cong. 293 (1979) (statement of Sis Kaplan, President, National Association of Broadcasters) (stating that any effort to pay for a performance right in sound recordings would upset the delicate balance between broadcasters and artists); *Performance Rights in Sound Recordings: Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the H. Comm. on the Judiciary*, 95th Cong. 28 (1978) (statement of Peter Newell, Chairman, Southern California Broadcasters Association) (indicating that record companies and performers receive free radio airplay, which is the most important factor in generating record sales and income for performers).

Radio stations also provide tens of millions of dollars in free publicity and promotions to the producers and performers of sound recordings in the form of air play, interviews

Based on a U.S. Government Accountability Office study, broadcast radio cannot deny that sound recordings and music content increase their revenue.¹⁵⁴ The chart below provides a comparison between annual revenues for a commercial broadcast radio station with music content compared to one with no music content.¹⁵⁵

Broadcast radio station rank by size of coverage population	Music Station predicted annual revenues	Nonmusic station predicted annual revenues	Difference in predicted annual revenues
Top quartile (Top 25%)	\$2,110,000	\$1,284,000	\$826,000
Bottom quartile (Bottom 25%)	\$372,000	\$166,000	\$206,000
All commercial broadcast radio stations	\$675,000	\$450,000	\$225,000

Based on these figures, music significantly increases a station's revenue. More stations choose a music format rather than a news or talk-radio format because music stations typically have more listeners, which allows them to charge more for advertisements. Performers deserve their fair share of the revenue generated by their songs.

V. ANALYSIS OF PROPOSED SOLUTIONS

The legislation introduced in the 111th Congress proposed a royalty rate system with a bracketed scheme based on the gross revenue of the radio stations:

with performers, concert promotions and publicity that promotes the sale of sound recordings and concert tickets. . . .

There are many radio stations, especially in small and medium sized markets, that are facing challenges. These stations would be particularly hard-hit by any new performance tax. So too would the many other small businesses caught by this new tax. Every bar, restaurant, retail establishment, shopping center, sports and other entertainment venue, transportation facility, juke box owner and everyone else who publicly performs sound recordings could be caught in this web.

Fair Compensation Hearing, *supra* note 63, at 42–43 (statement of Charles M. Warfield, Jr., President and Chief Operating Officer, ICBC Broadcast Holdings, Inc., New York, NY).

154. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 60, at 14.

155. *Id.*

Type of broadcast radio station	Radio Station annual revenue	Proposed royalty
Commercial	\$1.25 million and above	Royalty rate to be negotiated
	\$500,000 - \$1,249,999	\$5,000/year
	\$100,000 - \$499,999	\$2,500/year
	Less than \$100,000*	\$500/year*
	\$50,000 - \$99,999†	\$500/year†
	Less than \$50,000†	\$100/year†
Noncommercial	\$100,000 and above	\$1,000/year
	Less than \$100,000*	\$500/year*
	\$50,000 - \$99,999†	\$500/year†
	Less than \$50,000†	\$100/year†

* Final royalty bracket for H.R. 848

†Additional royalty brackets under S. 379¹⁵⁶

This new royalty would generate revenue to distribute to the performers who make the musical works popular. Under the proposal, the more radio play a song receives, the more royalties the performer would receive.¹⁵⁷ The current broadcast radio paradigm is based on the belief that once the public hears a song on the radio, they will rush out and buy the performer's sound recording.¹⁵⁸ The problem with this paradigm is two-fold: (1) with the availability of singles via iTunes and other digital download services, consumers rarely buy albums;¹⁵⁹ and (2) when a song becomes part of American culture, it is played on

156. H.R. 848, 111th Cong. (2009); S. 379, 111th Cong. (2009); U.S. Gov't ACCOUNTABILITY OFFICE, *supra* note 59, at 2, 41.

157. This is the same basic formula used by the performing rights societies to distribute royalties to publishers and writers. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 59, at 2, 41.

158. *Fair Compensation Hearing*, *supra* note 63 (statement of Charles M. Warfield, Jr., President and Chief Operating Officer, ICBC Broadcast Holding, Inc., New York, NY).

[T]here is no doubt that [] promotional benefits are important. The saying "I heard it first on the radio" is a refrain that purchasers of sound recordings recited in the 1920s and are still repeating today. The acknowledgements for performing artists that "I owe my success to radio" and from recording executives that "without radio my records would never have made it on the charts" have also, over the years, been repeated over and over, and over again.

Id.

159. *Id.* at 18 (statement of Marybeth Peters):

A recent article in Rolling Stone recounts how the decline in music sales has had ominous consequences for everyone associated with the record industry Consumers have bought more than 100 million iPods since their November 2001 introduction And according to research organization NPD Group, listenership to recorded music—whether from CDs, downloads, video games, satellite radio, terrestrial radio, online streams or other sources—has increased since 2002.

Id. at 18–19.

oldies stations or during a radio “flashback,” but does not generate the same number of album or song purchases as in the past.¹⁶⁰ As a result, artists must perform live well past their prime and into their retirement years just to earn enough income to survive.¹⁶¹

As an alternative to the flat rate proposal, the House of Representatives Parity in Radio Performance Rights Bill¹⁶² would require broadcast stations to pay a percentage of their gross annual revenue as a performance royalty.¹⁶³

Revenue Range	Stations pay 2.35% of annual revenue or flat fee	Stations pay 7.25% of annual revenue or flat fee	Stations pay 13% of annual revenue or flat fee
Commercial			
\$1.25 million or more	\$237,596,000	\$733,009,000	\$1,314,360,000
\$500,000 - \$1,249,999	\$12,945,000	\$12,945,000	\$12,945,000
\$100,000 - \$499,999	\$6,213,000	\$6,213,000	\$6,213,000
Less than \$100,000	\$268,000	\$268,000	\$268,000
Noncommercial	\$1,425,000	\$1,425,000	\$1,425,000
TOTAL	\$258,447,000	\$735,860,000	\$1,335,21,000

The chart compares the royalty revenue that would be generated from stations earning gross revenue within each “Revenue Range” category at three different percentage levels. The percentages are assumptions based on the Copyright Royalty Judges’ analysis of royalties in previous rate setting hearings.¹⁶⁴ Even at the lowest percentage level, \$258,447,000 is a significant sum to be shared by recording artists and record companies.

The current performance royalty system does not reflect the new music business reality brought about by a shift from an album-

160. See, e.g., *80's Internet Radio*, FLASHBACKRADIO, www.FlashbackRadio.com (last visited Feb. 28, 2011).

161. William Henslee, *Why Can't We Be Friends?: It's WAR!*, 30 LOY. L.A. ENT. L. REV. 87 (2009). See also *Fair Compensation Hearing*, *supra* note 63, at 95 (statement of Sam Moore, Recording Artist) (“And as for radio ‘allowing me’ to tour: well, thank you, but at almost 72 years old I’d rather be spending time with my grandchildren. If broadcasters shared any of the money they earn from playing my recordings, I would not have to continue to spend so much of my life running up and down the road. I don’t have the private jets and the extravagant tour buses with aides and staff to make my life comfortable. I don’t have a posse unless you count my wife Joyce who often does bag schlep for the both of us.”).

162. H.R. 848, 111th Cong. (2009).

163. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 59, at 23.

164. *Id.*

based sales model to a single-song download paradigm. To provide for the future viability of the music industry, Congress should pass a bill granting a full public performance right as put forth during the 110th and 111th Congresses.¹⁶⁵ The U.S. Copyright Office has officially asked for a public performance right since January of 1978, stating that there should be parity in sound recordings, and that the current distinction between sound recordings and other works of authorship should be abolished.¹⁶⁶ The scheme that the Register of Copyrights submitted in 1977¹⁶⁷ is preferable to the most recent bills because the 1977 bill included a clause limiting the songwriter's ability to assign the royalties. Ideally, it would be implemented in 2011 with minor changes.

On April 5, 1977, a bill "To amend the General Revision of Copyright Law" was introduced which stated:

(A) One-half of all royalties to be distributed shall be paid to the copyright owners, and the other half shall be paid to the performers to be shared equally on a per capita basis, of the sound recordings for which claims have been made under clause (1).

(B) Neither a performer nor a copyright owner may assign his right to the royalties provided for in this section to the copyright owner or performer of the sound recording, respectively.

(C) During the pendency of any proceeding under this section, the Register of Copyrights or the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.¹⁶⁸

For the royalty to truly benefit both the record company and the artist, it cannot be assignable. The most recent legislative proposals have not included the non-assignment clause from part B above.¹⁶⁹ If the royalty is assignable, record companies will demand that artists assign the royalty to the company when the artist enters into his record contract.¹⁷⁰ Record companies and artists are not equals in a record contract negotiation,¹⁷¹ and a record company would

165. H.R. 848, 111th Cong. (2009); S. 379, 111th Cong. (2009).

166. See *Performance Rights Hearing*, *supra* note 38, at 42–43; 1978 PERFORMANCE RIGHTS REPORT, *supra* note 44.

167. Performance Rights Amendments of 1977, H.R. 6063, 95th Cong. (1977).

168. *Id.*

169. Compare H.R. 848, 111th Cong. (2009), and S. 379, 111th Cong. (2009), with H.R. 6063, 95th Cong. (1977).

170. Compare Copyright Act of 1909, Pub. L. No. 60-349, § 24, 35 Stat. 1075, 1080–81, with Copyright Act of 1976, Pub. L. No. 94-553, § 304(a), 90 Stat. 2541, 2573 (codified as amended at 17 U.S.C. § 304(a) (2006)).

171. Henslee, *supra* note 161, at 98–99 (noting that in their 1987 contracts with their record company, the individual members of the band WAR assigned their rights in the name of the band and agreed that if any one of them ever left the band, the leaving member could not say that he was a former or founding member of the band. Four of the original five living founding

likely demand the performance royalty just as the companies demanded the assignment of the renewal term prior to the passage of the 1976 Act.¹⁷²

The most recent Senate and House bills have both contained a clause that specifically states that the new performance royalty will not impact the current performance royalty payable for use of the musical work.¹⁷³ This clause must remain in any proposed legislation so as not to rob the musical work owners and creators to pay the record companies and performers. Songwriters' royalties were recently reviewed by the Copyright Judges and after receiving testimony from interested parties, the Judges decided to maintain the status quo and keep the royalty rate at the level it had been after the last royalty review.¹⁷⁴ Music publishing companies and songwriters will likely not support an artist performance royalty if it means that the statutory rate will be reduced.

VI. CONCLUSION

Kenia is in great company when it comes to performers making money for songwriters and not sharing in the wealth. Whitney Houston sang "I Will Always Love You"¹⁷⁵ by Dolly Parton, the theme song for the film, "The Bodyguard." The song was released in advance of the film and received extensive airplay.¹⁷⁶ While the film and the

members of the band tour under the name "Lowrider Band" and their advertisements are not allowed to mention that the members of the "Lowriders" were ever in the band WAR).

172. Compare Copyright Act of 1909 § 24, with Copyright Act of 1976 § 304(a). William Henslee, *supra* note 55, at 129 n.172.

173. H.R. 848, 111th Cong. (2009); S. 379, 111th Cong. (2009); see also H.R. 4789, 110th Cong. (2007); S. 2500, 110th Cong. (2007); H.R. 6063, 95th Cong. (1977).

174. The new rate for physical products and permanent downloads is the same as the old rate (\$0.091) per song. *In the Matter of Digital Performance Right in Sound Recording and Ephemeral Recordings*, Docket No. 2005-1 CRB DTRA (Mar. 2, 2007), available at <http://www.loc.gov/crb/proceedings/2005-1/final-rates-terms2005-1.pdf>. See 17 U.S.C. § 804(b)(3)(A) (setting forth procedure to determine reasonable terms and rates of royalty payments).

175. See Joan McGurk, *Dolly Wasn't Parton With Hit Song*, BELFAST TEL., Mar. 26, 2007, <http://www.belfasttelegraph.co.uk/sunday-life/news/dolly-wasnt-parton-with-hit-song-13903099.html>.

176. *Hot 100 Singles*, BILLBOARD, Nov. 28, 1992, at 88. The song spent fourteen weeks at number one, which at the time was a record. See Fred Bronson, *Chart Beat: Another Lucky 13 For Boyz II Men*, BILLBOARD, Nov. 19, 1994, at 94; see also *Dolly Parton Reflects on Her Greatest Moments*, CMT (July 7, 2006), <http://www.cmt.com/news/country-music/1535871/dolly-parton-reflects-on-her-greatest-moments.jhtml> ("CMT: Is it true that Elvis also wanted to record 'I Will Always Love You'? Parton: I hesitated to tell it for a long time because I thought maybe people would not take it right because it was Elvis. But Elvis loved 'I Will Always Love You,' and he wanted to record it. I got the word that he was going to record it, and I was so excited. I told everybody I knew, 'Elvis is going to record my song. You're not going to believe who's recording my song.' It's like one of those things I told everybody. I thought it was a done deal because he

songwriter benefited from the airplay garnered for Houston's rendition of the song, she did not receive any income for her efforts.¹⁷⁷ The problem has existed for decades.¹⁷⁸ Historical reasons for preserving the status quo should not continue to block the passage of a performance rights royalty bill. While a performance rights bill granting royalties to performers will not save the industry, it is an important step towards compensating the individuals and companies that make musical works popular.

don't just say he's going to do something. Anyway, he sent word that he loved it and he was doing it. They get to town and they call and they ask if I want to come to the session -- and, of course, I was going to go. Then Colonel Tom [Parker, Presley's manager] gets on the phone and said, 'You know, I really love this song,' and I said, 'You cannot imagine how excited I am about this. This is the greatest thing that's ever happened to me as a songwriter.' He said, 'Now you know we have a rule that Elvis don't record anything that we don't take half the publishing.' And I was really quiet. I said, 'Well, now it's already been a hit. I wrote it and I've already published it. And this is the stuff I'm leaving for my family when I'm dead and gone. That money goes in for stuff for my brothers and sisters and nieces and nephews, so I can't give up half the publishing.' And he said, 'Well then, we can't record it.' I guess they thought since they already had it prepared and already had it ready, that I would do it. I said, 'I'm really sorry,' and I cried all night. I mean, it was like the worst thing. You know, it's like, "Oh, my God ... Elvis Presley." And other people were saying, 'You're nuts. It's Elvis Presley. I mean, hell, I'd give him all of it.' I said, 'I can't do that. Something in my heart says, Don't do that.' And I just didn't do it, and they just didn't do it. But I always wondered what it would sound like. I know he'd kill it. Don't you? He would have killed it. But anyway, so he didn't. Then when Whitney [Houston's version] came out, I made enough money to buy Graceland.").

177. The record company benefited from the record sales tied to the success of the song and the film, and Ms. Houston was paid for her performance in the film and did receive royalties from the sale of her record. However, Dolly Parton benefited from the song's success on the radio while Ms. Houston and her record company earned nothing.

178. Interview with Ricky Schultz, Former Owner of Zebra Records (Jan. 22, 2011) ("In the pre-payola days when it was standard procedure and legal for 'songpluggers' (music publishers) to offer cash incentives to broadcasters to play their songs a cozy relationship was established. Commercial broadcasters have long benefited from effectively lobbying our government. The landmark Communications Act of 1934 was all but gutted by the 1970s and its original intent of protecting the 'public airwaves' is nowhere to be seen anymore. The specter of collusion remains. A colorful point of reference: the seed money for MCA (later Universal) came from Al Capone. Music publishers have not had to share the pie and commercial radio, built largely on the re-broadcast of recorded music has received practically a free ride. The lack of adequate and equitable laws is unjustifiable and has caused the most harm to individual recording artists and small, independent record companies. In denying royalties to the performers (and labels), an important additional revenue stream which could make the difference between success and survival has been taken away. Hopefully long overdue, pending legislation to correct this injustice will pass, and incorporate a generous measure of retroactivity." © 2011 Ricky Schultz).

